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IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NEW YORK CITY COMPTROLLER, LOS ANGELES, CALIFORNIA, PHILADELPHIA, PENNSYLVANIA, SAN FRANCISCO, CALIFORNIA, BOULDER, COLORADO, OAKLAND, CALIFORNIA, CARRBORO, NORTH CAROLINA, BERKELEY, CALIFORNIA, NEWTON, MASSACHUSETTS, SANTA CRUZ, CALIFORNIA, AMHERST, MASSACHUSETTS AND THE COUNTY OF ALAMEDA, CALIFORNIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The decision of the First Circuit Court of Appeals in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), invalidates a Massachusetts selective purchasing law designed to discourage purchases by the state, using public money, of goods and services from businesses and individuals that do business with Burma (now known as Myanmar). This "Burma law" requires state agencies to deem that bids from such businesses and individuals are ten percent higher than the price actually offered. *See* Petition for a Writ of Certiorari, Sec. 2A. The ten percent competitive advantage afforded entities that do not do business with Burma reflects the preference of the citizens of Massachusetts and their elected officials not to use tax levy dollars in ways that support the profoundly antidemocratic government of Burma in its well-documented campaign of human rights abuses. The First Circuit ruled, *inter alia*, that the Commonwealth of Massachusetts lacked a "legitimate local purpose [for this law] that cannot be adequately served by reasonable nondiscriminatory alternatives" and held that the law unconstitutionally encroaches on federal authority over foreign affairs.

The *amici curiae* are cities, towns, counties or elected officials[2] of cities having selective purchasing laws similarly limiting their purchase of goods and services from putative

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

[2] The Comptroller of the City of New York is an independently elected official who, under the City Charter, has oversight authority over City contracting procedures, including compliance with selective purchasing laws, and who is a trustee of, and the investment advisor to, the City's pension funds.

contractors that do business with Burma and/or other countries. Each *amicus'* selective purchasing law is one of a series of initiatives intended to ensure that it conducts its fiscal affairs in a socially responsible manner -- which includes refusing to do business directly or indirectly with entities that violate basic human rights norms. In addition to using their purchasing power to attain this goal, many of the *amici* also encourage businesses that wish to attract their significant investment capital to act responsibly and ethically. The local government *amici* have a significant stake in the continued viability of selective purchasing laws and are concerned about maintaining the proper federal-state balance in this respect.

SOURCE OF AUTHORITY TO FILE

Amici have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Pursuant to Rule 37.2(a) of the Rules of this Court, *amici* obtained letters from each of the parties granting permission to file this brief, which accompany this submission.

SUMMARY OF ARGUMENT

The *amici curiae* urge this Court to grant Massachusetts' petition for a writ of certiorari because the decision below fails to give appropriate weight to the important state and local interests implicated by selective purchasing laws, describes a lesser role for state and local governments than was contemplated under our federalist system, and ultimately threatens to disrupt the legitimate business practices of a multitude of state and local governments nationwide.

Selective purchasing and investment laws, including the Massachusetts "Burma Law", Mass. Gen. Laws, Ch. 7, §§ 22G-22M, are important devices through which state and local governments structure their fiscal affairs to reflect the shared values and ethical concerns of their citizens. The First Circuit

improperly failed to accord any weight to Massachusetts' proprietary interest in controlling the disposition of its public funds, which is a well-established and central attribute of state sovereignty.

Absent Constitutional preemption, states and localities have the sovereign authority to make choices about the businesses and individuals with whom they wish to do business, even if those choices touch on foreign sensitivities. Therefore, the courts should defer to Congress to determine when a state or local action impinges on the exclusive federal foreign affairs power. Only Congress has the expertise, and Constitutional authority, to make this determination.

Increasing numbers of claims like those in this case inevitably will be presented to the courts as the demands of international commerce collide with the traditional sovereignty concerns of state and local governments under our federalist system. These claims will be even more common in the wake of the First Circuit decision, which inappropriately relied on complaints by foreign countries and trade organizations to make its determination that Massachusetts' Burma Law is unconstitutional. This analysis grants these entities a veto over state and local law and provides an incentive for them to lodge complaints against any state or local law that touches on their interests, however tangentially. The bare existence of trade complaints by self-interested foreign parties does not turn local communities' procurement and investment choices into the kind of "foreign policy" more properly within the federal government's control.

ARGUMENT

I. SELECTIVE PURCHASING LAWS REFLECT STRONG AND LEGITIMATE LOCAL INTERESTS CONCERNING THE USE OF PUBLIC MONEY THAT FALL WELL WITHIN THE RESERVED POWERS OF STATE AND LOCAL GOVERNMENTS UNDER THE CONSTITUTION.

In this case, the First Circuit has decided "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." United States Supreme Court Rule 10(c). The First Circuit's sweeping decision invalidating the Massachusetts Burma Law because it lacked a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" calls for review in this Court. *National Foreign Trade Council*, 181 F.3d at 70. The lower court's decision denies a central attribute of state sovereignty and threatens to upset the proper federal-state balance in this area.

There is no doubt that the federal government has broad authority over foreign affairs. However, it is equally clear that the states retain residual authority over matters not specifically delegated to the federal government, including areas of traditional state authority that may touch on foreign interests. *See Printz v. United States*, 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77 (1997) (states retain powers not expressly granted to the federal government); *see also* 10 Op. Off. Legal Counsel 49 (1986) ("[t]he historical rationale for the general federal power over foreign affairs does not imply the displacement of state proprietary power").

Selective purchasing laws like the Massachusetts Burma Law implicate a core aspect of state sovereignty: control over the use of local public assets, including spending and investment programs. *See Alden v. Maine*, 119 S.Ct. 2240, 2264-65 (1999). As "guardian and trustee" of public resources, a state or local government's decision not to use tax levy revenues to transact business, directly or indirectly, with entities that fail to respect basic human rights norms is a fitting expression of the collective will of its citizens on a matter of particularly local concern. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, 100 S.Ct. 2271, 2273 (1980). Selective purchasing laws allow taxpayers collectively to express their values and preferences in matters of public procurement, much as private citizens do when refusing to purchase consumer goods from companies whose business, employment, or other practices they find offensive.[3]

There is no "nondiscriminatory alternative" to selective purchasing laws available to states and localities. The goal of selective purchasing laws is not merely to express generalized disapproval of Burma or other countries; it is to avoid using public money to help them continue in their objectionable activities. Enactment of one of these laws may be based on disgust at a putative contractor's human rights record. *See Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1981) (state may consider "moral integrity" of a contractor in deciding whether to award a public contract). It may derive from state and local representatives' fiduciary responsibility to consider whether the practices of a company seeking public investment or contracts compromise its value as an economic partner by inviting legal liability or consumer boycotts. In either event, these are issues of important local concern that cannot be satisfied by other means.

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[3] Indeed, there are strong arguments, which *amici* do not address here, that to the extent selective purchasing laws are pure expressions of public morality they enjoy First Amendment protection from interference by the federal government. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. (Feb. 1999).

It might be a different matter if, for example, a state or local government were to prohibit its citizens from transacting business with Burma, or from investing in companies with which Burma does business. But notwithstanding the First Circuit's unsupportable assertion that selective purchasing laws amount to "regulation" rather than market participation[4], this is not what they do. The multinational corporations and foreign government affected by Massachusetts' Burma Law are free to conduct business with anyone willing to contract with them, including residents of Massachusetts. The question here is whether state and local governments are required to do business with these entities despite their judgment that it is not in their citizens' interest to do so.

This question is important because state and local selective purchasing and investment initiatives represent community-based democracy at its best. These laws raise public consciousness on important questions of public policy and stimulate debate as to the best disposition of community resources. Galvanized by the prospect of public contracts going to contractors whose human rights and other practices offend basic values, citizens voice their concerns and participate in civic life. State and local representatives respond to their constituents by assessing public needs and ethical priorities and developing a fiscal program or set of programs that strikes a balance between them. If the balance is struck incorrectly or in a manner that does not reflect the interests of the electorate, the appropriate parties are easily held accountable on voting day. *See Alden*, 119 S.Ct. at 2264 ("the allocation of scarce resources among competing needs and interests lies at the heart of the political process").

In this highly political arena, the only legitimate way to determine whether a locality's spending activities have exceeded its authority and invaded the federal government's foreign affairs prerogative is to rely on the appropriate federal branch -- Congress -- to say so. If Congress believes that the business practices of a local government infringe on important foreign policy interests, it knows how to preempt them.[5] Local control over investment and purchasing decisions is part of our Constitutional history. Where, as here, Congress has "passively indicate[d]" that local practices do not "impair federal uniformity in an area where federal uniformity is essential", *Barclays Bank v. Franchise Tax Board*, 512 U.S. 298, 323, 114 S.Ct. 2268, 2281 (1994), state and local governments should be permitted to exercise their sovereign right to fiscal self-determination.

For this reason the First Circuit's readiness to declare illegitimate the local interests expressed through selective purchasing laws, particularly in the absence of any express constitutional prohibition or indication of Congressional preemption, is deeply troubling. As this Court recently cautioned in another case dealing with the balance between federal interests and state sovereignty:

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[4] The cases cited by the First Circuit for this proposition are inapposite. Unlike the law at issue in *South Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (1984), selective purchasing laws do not affect "downstream" markets. Similarly, *Camps/Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S.Ct. 1590 (1997) involved state taxation, which is inherently regulatory, not state purchasing, which is not.

[5] As discussed in detail in Argument IV of the Petition for a Writ of Certiorari, this Court should review the lower court's finding that the 1996 Federal Burma Law preempts state and local selective purchasing laws.

> "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests [seeking public money] must be reached after deliberation by the political processes established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen . . .When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."

Alden, 119 S.Ct. at 2264-2265.

II. CONTINUING CHALLENGES TO SELECTIVE PURCHASING LAWS ACROSS THE COUNTRY ARE INEVITABLE.

This Court also should review the First Circuit's decision because the escalation of claims like the one in this case is inevitable. As even the court below acknowledged, 181 F.3d. at 59, n. 14, it is increasingly difficult to draw meaningful distinctions between "foreign" and "local" matters, particularly in the business context. Today, state and local governments routinely make purchasing and/or investment decisions involving foreign companies, foreign goods and foreign services. The increasing tension between our constitutional tradition of local control over spending and the demands of international trade calls for guidance from this Court.

Over the last twenty years, as trade with international entities has become more common, increasing numbers of state and local governments have adopted selective purchasing and other ethical guidelines for their business affairs. This phenomenon may be traced to the powerful grass-roots movement to divest public and private resources from apartheid-era South Africa; citizens began to learn about their

state and local governments' commercial relationships and to express objections to doing business with entities that fail to comport with basic standards of public morality or integrity. [6]

Many communities have enacted selective purchasing laws, like the Massachusetts law at issue here, that restrict public contracts with entities that do business with foreign sovereigns having poor human rights records. *See, e.g.,* Los Angeles, Admin. Code, §§ 10.38 et seq.; San Francisco, Admin. Code Ch.12J; Philadelphia, Code §17-104(b); Alameda County, Admin. Code, Ch. 4.32, Ch. 4.36; Oakland, Muni. Code, Ch. 2.04, Arts. II, III; City of Newton, Ordinance V-146; Boulder, Sec. 2-8-11, B.R.C. 1981. Other communities have adopted investment guidelines concerning the investment of public funds in these businesses or in others that engage in practices that offend community ethics. *See, e.g.,* Santa Cruz, City Council Policy No. 29.13 (Burma); Takoma Park, Ord. No. 1985-4, § 1 (investments in companies that produce nuclear weapons); Vermont Acts of 1999, ch. 13 (state pension funds required to support shareholder resolutions concerning Burma). Three states and a number of cities have enacted laws limiting the purchase of wood from tropical rainforests, buying only tropical timber that is harvested using ecologically-sound management practices.[7] Numerous cities and counties have laws prohibiting the procurement of products made in sweatshops.

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[6] According to one commentator, 23 states, 14 counties, 80 cities and the Virgin Islands enacted divestment or procurement laws directed to South Africa's apartheid policies alone. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, The American Journal of International Law, 821, 822 (1989).

[7] *See, e.g.,* Ariz. Rev. Stat. Ann. § 34-201 (West 1998); N.Y. State Fin. Law § 165 (McKinney 1998); Tenn. Code Ann. § 4-3-112 (1998); Baltimore, Ord. No. 635 (passed 1991); Bellingham, Resolution No. 43-90 (passed Aug. 1990); San Francisco, Ordinance No. 391-90; Santa Monica, Mun. Code. ch. 2.28.

See, e.g., North Olmstead Resolution No. 97-9 (1998). A number of jurisdictions have enacted "Buy-American" laws for public procurements. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (upholding Pennsylvania Steel Products Procurement Act), *cert. denied*, 501 U.S. 1212 (1991). Still other states and localities vest authority in government officials to consider non-economic issues in making investment and/or contracting decisions.[8] Many of these jurisdictions employ some combination of these strategies to effectuate the particular shared values and fiscal priorities of their citizens.[9]

In declaring Massachusetts' selective purchasing law unconstitutional, the First Circuit accepted the bare existence of complaints by trade associations and foreign sovereigns as evidence that it excessively interferes with foreign relations. *See National Foreign Trade Council*, 181 F.3d. at 54. However, the fact that local commercial activity may have some international ramifications simply demonstrates that the markets

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[8] For instance, state and local procurement laws often require a determination that a contractor is "responsible" before it can be eligible for government contracts. See, e.g., N.Y. Gen. Mun. L. § 103 (1998). Government officials can include non-economic criteria in this assessment, thereby incorporating general public interest values into their consideration.

[9] For example, New York City has enacted selective purchasing requirements for public procurements relating to corporate involvement in South Africa, New York City Charter §§ 1523(3), 1524; New York City Admin. Code §§ 6-115-a, 343-11.0 (all repealed in 1993); Burma, New York City Charter §§ 1523(3), 1524; New York City Admin. Code § 6-115 (1998); corporate participation in the Arab boycott of Israel, New York City Admin. Code § 6-114; corporate employment practices in Northern Ireland, New York City Admin. Code § 6-115.1; and the purchase of recycled products, New York City Admin. Code § 6-322. These matters all are of serious concern to New York citizens, and the singular mix of fiscal initiatives in place reflects that fact.

in which state and local governments, corporations and other private parties participate have become globalized. The mere existence of complaints by foreign parties does not transform decisions about community business priorities into the kind of "foreign policy" reserved for the federal government.

This analysis is of particular concern because it provides these entities with a strong incentive to lodge complaints about all such laws, regardless of how tangential the impact on international affairs. It dangerously threatens state and local sovereignty by essentially ceding veto power over these state and local laws to third parties who stand to profit if they are invalidated. The lower court's decision has put a risk the well-conceived purchasing and investment programs of literally dozens of states and localities nationwide. In view of the important state and local interests implicated, the First Circuit decision should be reviewed by this Court.[10]

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[10] The lower courts' decisions in this case also pose a concrete threat to the fiscal programs of state and local governments outside the parameters of the First Circuit. Respondent NFTC has sent carefully worded letters to a number of these jurisdictions detailing the potential for litigation -- and the risk of substantial attorneys fee awards -- on the basis of the lower courts' ruling. Absent review by this Court, the enactment and enforcement of ethical purchasing and investment laws nationwide may be chilled, particularly in small communities that can ill afford to pay for litigation against well-funded trade groups.

CONCLUSION

For the reasons stated above, the local government *amici* respectfully request this Court to grant the Petitioners' Request for a Writ of Certiorari.

Dated: New York, New York
October 20, 1999

Respectfully submitted,

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